First Principles.

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Foreign Policy and Human Rights: An Agenda

BY ROBERT L. BOROSAGE

When President Carter launched his human rights policy, its direction was far from clear. Moral sanctimony is common among statesmen, who quickly learn to exempt their own behaviour from the standards they preach. Yet the new President's concern came in sharp and pleasant contrast to the cynical disregard of human rights by Henry Kissinger and the presidents who served him. The promise of a policy based upon fundamental human values bred the hope that it might be so.

No policy can be fairly judged after six months. The pinstripes on the political appointees are scarcely rumpled, and the struggle with the permanent bureaucracy hardly joined. Moreover, much in the administration's active foreign policy offers the hope of a new direction—the realignment in southern Africa, the pledge to remove troops from Korea, the relaxation of tensions with Cuba, Vietnam and Jamaica. Yet even with these caveats, sufficient evidence exists to justify increasing doubts about the President's course on human rights.

In his Notre Dame address, President Carter reaffirmed that human rights would remain "a fundamental tenet" of his foreign policy. Yet in recent weeks both the President and Secretary of State Cyrus Vance have spent their time reassuring conservative critics, nervous allies, and blustery Russians that they will be "flexible" in applying human rights considerations, that America has other interests which predominate, that the policy would not be conducted, as the President said, "by rigid moral maxims."

Indeed, many are beginning to suspect that the policy has already served its major purposes for the administration. Its primary effect to date has been in the United States. The rhetoric of human rights, of idealism and principle, has won public purchase of an activist foreign policy which otherwise would have been most difficult to sell. Equally important, the language of human rights has provided instant absolution to the national security establishment, rebuilding the elan, moral certitude, and thirst to govern of the certified foreign policy faces, who were temporarily shaken, even abashed, at their follies in Vietnam. The haggard look of uncertainty, of self-doubt, of reticence has disappeared.

Now, Zbigniew Brzezinski, the President's National Security Advisor, boldly proclaims that the United States again "has to set about building a new world system," comparing the task to the effort of the early Cold War days of 1945-1950.[1] What Arthur Schlesinger called the "liberal evangelism" of American foreign policy has been reborn, hardly an unmixed blessing for those who hoped the administration would minister to domestic ills rather than expend its missionary zeal on global adventure.

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It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.

THOMAS PAINE

In the past, evangelism contributed much to the Cold War, and it is not surprising that a second product of Carter's human rights policy has been renewed ideological conflict between the Soviet Union and the United States. Upon first setting foot in the Oval Office, President Carter dispatched a personal letter to Andrei Sakharov, a leading Soviet "dissident." This was followed by stern public criticism of Soviet and Czech treatment of internal critics, by attempts to get the UN Human Rights Commission to investigate the USSR, by a request for a vast expansion of funding for the Voice of America and Radio Free Europe, and by several other actions bringing well-deserved public obloquy on the USSR. These activities gained the administration great favor among conservative critics, and a start on rebuilding a broad foreign policy consensus.

But the costs have been high. Inside the Soviet Union and Eastern Europe, the controls have tightened, dissenters have been jailed, and charges of treason have been levied. In foreign exchanges, the rhetoric has grown more heated than it has been in years, and the Carter offensive surely contributed to the rude reception which his arms limitation proposals received in Moscow. In this country, the administration's attacks have fed the hardly latent anti-communism which still exists on the surface of American politics. It has emboldened those seeking higher military spending, encouraged those opposed to detente and anxious to reassert America's interventionist role in the world. It has benefited those who will oppose any decent arms limitations agreements coming out of the SALT talks.

These effects may have been what the administration had in mind all along. President Carter has defended his Soviet policy in terms which would warm the cockles of any cold-warrior's heart:

> I think it has been a well-recognized international political principle that interference in a government is not a verbal thing. There is an ideological struggle that has been in progress for decades between the Communist nations on the one hand and the democratic nations on the other. . . .[2]

The administration has virtually courted a renewed "ideological struggle" with the Soviet Union. The general feeling seems to be that detente with the Soviet Union is neither as important nor as fragile as Kissinger believed; it can be endangered in order to gain the moral upper hand in world circles, and to paste together a foreign policy consensus at home. What Kissinger constructed as a house of cards, Brzezinski treats as a weathered old barn, capable of withstanding much horseplay. Brzezinski goes so far as to say, "We are challenging the Soviets to co-operate with us or run the risk of becoming historically irrelevant to the great issues of our time." This is a breathtaking conception to hold towards a country which can trigger Armageddon.[3]

In recent weeks, the administration appears to have retreated somewhat from its previous stance towards the USSR, after the leaders of our Western European allies made their misgivings clear. Not since March 1st has the President spoken in support of any specific human rights violations in the communist nations. A recent Sakharov letter went unanswered. President Carter has repeated that he "reserves the right" to speak out about human rights violations anywhere, but he seems to have learned to forego exercising that right. The best indication of the administration's temper will come this month at the Belgrade meetings at which thirty-five nations will review the progress made in implementing the Helsinki Accords, which include extensive human rights guarantees. In his meeting with the heads of the NATO governments, Carter promised that he intended to "approach these meetings in a spirit of cooperation, not confrontation."[4]

If the President is back-pedaling a bit on the USSR, it comes none too soon, for this thrust of the human rights policy seems clearly wrong-headed. While the Kremlin's unspeakable treatment of dissent merits condemnation, Carter's verbal jibes have little chance of improving the lot of the dissenters and can do much to chill relations between the two countries. At home, his rhetoric refuels public support for aggressive anti-communism, endangering the political space gained in the late sixties. Abroad, it would be tragic for a human rights policy to result in a renewed Cold War, endangering the fundamental right of humans to live in peace, secure from nuclear destruction.

A Different Course

The administration's initial emphasis on the violations of rights in the Soviet Union and Eastern Europe flaunts the few sensible principles which might guide a progressive human rights policy. Obviously human rights concerns must be weighed against other priorities, balanced against other values. In his speech in Atlanta on Law Day, Secretary of State Vance visited on his patient audience a long compendium of considerations which limit human rights concerns. But leaving the calibration to the estimable officials of the State Department, some obvious principles can be established to put the policy on a different course.

Secretary Vance has testified that the administration intends to have one "set of criteria" for all countries, big, little or Red, but the difference between those countries which have the capability to destroy the United States and those which do not cannot be ignored.[5] For the latter, human rights concerns may be paramount; for the former, cooperation in survival is the first human right.

In a world of repressive governments, concern for human rights is a revolutionary policy. As such, it can be used as a justification for active intervention abroad, a suspicion which the Latin American countries justifiably harbor towards the Carter policy. The President's emphasis on the "power of words" merely feeds this suspicion. Clearly there is a vast difference between hectoring other countries about their treatment of their citizens and identifying and ending American complicity in torture and repression. It is not, after all, an historical accident that democracy is almost extinct in Latin America, or that the major U.S. allies across the world—South Korea, the Philippines, Thailand, Iran, Zaire, and Brazil—are dictatorships, propped up by the bayonet and the lash. Over the years, the U.S. with its enormous public and private investment and political and economic involvement in these countries has been directly implicated in the spread of repression.

In Latin America, for example, the U.S. has armed and trained the military which now govern throughout the hemisphere. Over 30,000 Latin American officers from dozens of countries have been trained at the U.S.-run School of the Americas in Panama since it opened shop in 1949. They have imbibed the American teaching on subversion, counter-insurgency, and anti-communism. They were taught to see themselves as a force of rationality and efficiency above politics, holding the national trust from subversion. They learned, as Schlesinger wrote of the Kennedy policy, that while the U.S.

preferred democracy, it would always support a stable dictatorship to fend off a marxist alternative. Thus when the political situation grew volatile in Brazil, Uruguay, Ecuador, Argentina, Peru, Bolivia, and in Chile, the military intervened to establish order.

The national security doctrines of the military have been reinforced by the economic demands made by private and public financial institutions. American corporations and banks demand stability as precondition for large loans and investment. They seek a docile labor force, a tranquil political situation, guarantees against expropriation. In Latin America such conditions are often purchased only by bayonet.

The U.S. has also played a more active and direct role in the establishment of dictatorship. In Ecuador, in Brazil, in Chile, and throughout Latin America, the Central Intelligence Agency has been actively involved in subverting the democratic process—fixing elections, spreading black propaganda, bribing officials, toppling the unreliable or unfriendly. It is not surprising that these Latin American regimes are bemused by the new policy extolling human rights.

President Carter has acted as if American policy were reborn with his administration, and the President should not be held responsible for the activities of his predecessors. Yet the administration can hardly go about badgering others about their violations of human rights without first ending American complicity in human rights violations abroad.

If serious about human rights, the administration's attention would focus upon U.S. policy, particularly towards those regimes which are more or less dependent upon American succor and support. Insistence on human rights standards can provide the basis for unpacking inherited alliances with corrupt and repressive dictators; it would lead not to another period of foreign policy adventure, but to a new appreciation of restraint and cooperation. Were this the administration's objective, a relatively clear foreign policy agenda could be defined.

An End to Covert Intervention Abroad

The CIA's covert operations prey upon the very political freedom which Carter has called on countries to provide for their citizens. A "free press" is an open invitation to CIA propaganda dispersed through the over 200 news services which the Agency uses in the world. Free elections are but a succulent temptation for covert election financing and bribery by the CIA, as demonstrated recently in the Italian and Portuguese elections. Independent labor unions have been subverted for internal disruption, as was the case in Chile. It will hardly do for the President to condemn the repressive police in other countries while his own covert arm is involved in training and bribing those same officials, and maintains close liaison with the brutal Chilean DINA, Iranian SAVAK, and South Korean KCIA.

We may dismiss the lesson of Allende's Chile, but the leaders of progressive movements cannot have the luxury of such social amnesia. In Chile, the CIA operated to twist every "free institution" to its ends. Elections were distorted, officials purchased, political parties deformed; the free press was turned to propaganda, the trade unions were used for internal disruption, and finally, an independent military with a tradition of constitutionalism was directed into coup politics. The staff of the Senate Intelligence Committee concluded that "the pattern of United States covert action in Chile is striking but not unique . . . The scale of CIA involvement in Chile was unusual but by no means unprecedented."[6]

Indeed, in a review of major covert operations from 1965 to 1976, the Pike Committee found that some 32 percent involved "election support"; 29 percent were for media and propaganda; and 23 percent in paramilitary activities. Ironically, two-thirds of the CIA's covert operations were dependent upon some form of political freedom—a free press to subvert or free elections to purchase.[7]

The CIA's routine operations are little better than its spectacular overt covert operations. Clandestine Services is the government's entry into the sordid world of the bribe, the buyer, and the bought. Payment of money to government officials for information and favors is the CIA's stock in trade. President Carter defended the payments to foreign governments as "legitimate and proper intelligence operations."[8] The defense belies his pledge to act abroad according to American standards at home, for Mr. Carter's Justice Department shows every intention of indicting at least a few of our legislators who accepted money from the CIA's pupil, the Korean CIA.

Secretary of State Cyrus Vance has attempted to distinguish the two cases. The CIA's bribes, Vance stated, were a "government to government operation . . . A cooperative arrangement leading towards common objectives"—a sort of aid program for spies.[9] The KCIA bribes were not approved by the government. Whatever one may think of the Secretary's distinction, it has little to do with what E. Howard Hunt called the "long and honored tradition within the CIA" of getting officials at all levels of government on the Agency dole.

No legislation has been passed which significantly limits the CIA's covert operations. President Carter and Secretary of State Vance have promised to use covert operations only in "rare and exceptional circumstances." But this pledge is scarcely different from the standard which previous Presidents allegedly followed. The question is whether the Administration will maintain the CIA's clandestine apparatus in place around the globe. If so, the President may have to explain for skeptics both at home and abroad how this fits with his impassioned human rights stance.

Ending Military Assistance and Arms Sales

President Carter has acknowledged that the United States is the world's great merchant of death, having cornered some 50% of the world armaments market. U.S. arms exports have risen from $798 million in 1968 to $9.5 billion in 1975, and may reach some $14 billion this year. According to the U.S. Arms Control and Disarmament Agency, the United States exported some $24.5 billion or 53% of all arms acquired by underdeveloped countries over the 10 year period from 1965 to 1974. In addition, the U.S. has channeled almost $67 billion worth of military assistance to foreign governments over the past 28 years. In 1974, Senator Alan Cranston reported that some 69% of the countries receiving military grants, and 58% of those receiving military credit sales were "repressive regimes."[10]

Moreover, the United States is still involved in arming, training, and advising foreign police forces—the very units most directly involved in suppression of political freedom. According to documents released under the Freedom of Information Act to Center for National Security Studies Associate Michael Klare, U.S. arms manufacturers have sold more than

50,000 handguns, 10,000 machine guns and rifles, 155,000 gas grenades, and 6,000 canisters of MACE to police organizations in the Third World. Under the International Narcotics Control Program, the State Department has provided arms, equipment and training for police units; the Justice Department's Drug Enforcement Administration has established elaborate training programs for foreign police personnel, and the DoD continues to support military units engaged in domestic law enforcement.[11]

In 1976, reacting to the cynical excesses of the Kissinger foreign policy, the Congress enacted human rights limitations on security assistance to other countries. The provision, known as the Harkin Amendment after its author, Representative Thomas Harkin, prohibits security assistance to any government which engages in "a consistent pattern of gross violations of internationally recognized human rights," except under "extraordinary circumstances." In essence, it requires that the U.S. not supply arms and ammunition to regimes which maintain a program of torture and murder of citizens. In 1976, the Congress restricted aid to Chile and Uruguay, in spite of opposition from the Ford Administration.

The Carter Administration has done little to advance this *congressional* initiative. Acting under the Harkin amendment, the administration recommended cuts in some military assistance to Argentina, Uruguay, and Ethiopia, a recommendation which did far *less* than what would have been supported by congressional opinion. The administration reassured the South Korean government that torture would not interfere with our arms assistance there. The budget authority requested for FY 1978 includes substantial assistance to Indonesia, South Korea, the Philippines, Thailand, Zaire, and Brazil. In debates in the House of Representatives, administration officials have opposed the attempts to cut off aid entirely to the five countries —Brazil, Argentina, Uruguay, El Salvador, and Guatamala— which announced that they would reject U.S. foreign military sales credits. Instead, the administration dispatched Assistant Secretary of State for Latin America Terence Todman to inform a House Subcommittee that the U.S. should continue to provide Latin American countries with military assistance even if they do trample the rights of their citizens.

On arms sales, the administration's record is equally spotty. Upon entering office, Carter placed a partial moratorium on arms sales pending a policy review (but by the end of April, the President had personally approved over $4.5 billion in arms sales during the moratorium). On May 19th, the President released his much ballyhooed new policy on arms sales, designed to "place the burden of proof" against any specific arms transaction.[12] But the actual policy statement contained so many loopholes, provisos and savings clauses, that Pat Holt, the respected former Staff Director of the Senate Foreign Relations Committee, termed it "one of the thinnest collections of guidelines to come out of the White House in a long time."[13] At best it serves primarily to improve the administration's control over arms sales, and need not limit them in the slightest. The $34 billion in the "pipeline" will not be affected. The administration has already reassured Iran, Israel, and Saudi Arabia that their requests overcome any burden of proof. In FY 1977 these three countries alone accounted for some $5.6 billion of the $8.8 billion in arms sales, and the figures promise to be similar this year. *Business Week* reports that Saudi Arabia alone has budgeted some $20 billion for arms purchases in the next five years.[14] Mr. Carter has pledged that the level of arms sales will decline over time, but only the true believers expect any notable change in the near future.

Here as elsewhere the Carter promise far exceeds the performance. At Notre Dame, the President announced that "we are now free of that inordinate fear of communism which once led us to embrace any dictator who joined our fear." But the administration has done little to loosen the embrace. There is no notable distinction between the vicious governments in the three countries suffering partial aid cut-offs and an entire range of U.S. allies whose record on torture and political imprisonment is as wretched, if not worse—countries like South Korea, Indonesia, Iran, Zaire, and Brazil. As Richard J. Barnet has noted, the administration seems to divide the world into two categories, "countries unimportant enough to be hectored about human rights and countries important enough to get away with murder."[15] But if supposed national security considerations are sufficient to justify military aid to the countries named above, then Mr. Carter's policy may differ from his predecessors' mainly in words, and not in deed.

The President has repeatedly stated that his human rights policy must be consistent and even-handed if it is to gain credibility in the world. Continued military assistance to "gross violators" of human rights can only undermine the credibility which he seeks.

It is not too much to suggest that the U.S. get out of the business of arming the world's police, even as we decline to continue our part as the world's policeman. Indeed, prior to the vogue in human rights, many voices were raised against *any* continued military assistance to developing nations. After all, to continue arming the military in democratic countries seems Kafkaesque: surely we need not bolster the military in the few countries which are democratic until they pull off the military coup which makes them ineligible for further assistance. It may be too much to expect the administration to support termination of our military assistance and sales to developing countries, but enforcement of the Harkin language seems the least to require of the administration's human rights policy.

Economic Assistance: End the Financial Prop

In 1975, the Congress passed an amendment to the Development Assistance Act that prohibits U.S. economic aid to any government which engages "in a consistent pattern of gross violations of internationally recognized human rights," with an exception for assistance which "will directly benefit the needy people in such country." No country has yet been denied economic assistance as a result of this language, although limitations have been placed upon economic aid to Chile, Uruguay, and Brazil.

Human rights limitations on direct U.S. aid alone are hardly sufficient, for over the past years, foreign assistance has been increasingly removed from direct congressional review. In fiscal year 1976, an estimated 69 percent of U.S. and multilateral foreign aid reaching the Third World did so without prior congressional review of country allocations.[16] International financial institutions—the World Bank, the International Monetary Fund, the Asian Development Bank, the Inter-American Development Bank—increasingly provide much of the assistance and loans flowing to the Third World. In 1975, Congress began to apply human rights language to these institutions also, passing legislation directing the U.S. representative of the Inter-American Development Bank and the African Development Fund to vote against aid to countries which violate human rights, unless the funds directly benefit the poor.

The application of human rights language to these institu-

tions was merited by their increasingly political role. Although each claims to make loan decisions solely on the basis of purely "economic" criteria, these standards are far from neutral. After the election of Allende in Chile, for example, the Inter-American Development Bank drastically reduced its commitments to Chile, and the World Bank cut its loans entirely. When Allende was felled by the coup d'etat, the loans from all international institutions rose dramatically, even though economic conditions grew even more chaotic.

In continuation of its policy in the area, Congress this year is considering similar human rights restrictions on the World Bank group and the Asian Development Bank. Swift passage was expected until the Carter administration dispatched Patt Derian, the State Department's Coordinator for Human Rights, to tell the Congress that there was no need for legislated restrictions on U.S. aid. Derian urged the legislature not to "rely too much on aid cuts," and other "negative" approaches in promoting human rights. The President added his opposition in a press conference, calling for "flexibility" to bargain with foreign leaders, a felicitous phrase borrowed from the vocabulary of Henry Kissinger. The House of Representatives passed the amendment in spite of administration opposition, and at this writing a floor fight is pending in the Senate.

Administration spokesmen claim that they can be more effective in forwarding human rights concerns if they have the flexibility to threaten the cut-off of loans in private. They put the argument in revival meeting language: if you have trust in the President, then you must place your faith in his wisdom.

For the unredeemed, the argument sounds a different chord. Traditionally, the call for flexibility reflects an administration's desire to monopolize authority and license in foreign policy. Flexibility is important if human rights concerns are to be used as an instrument for *other* ends, an instrument which can be picked up or shelved at will. Congressional limits on U.S. representatives require at least a more consistent public position on human rights, making assistance to torturers beyond the pale of policy options (unless the aid directly benefits the needy). Congressional limits only determine the public posture, however; thus it is reported that the U.S. representative on the Inter-American Development Bank votes against loans for the Chilean junta, while lobbying for them in the halls.

Moreover, the record of past administrations hardly suggests that Congress should blindly pledge itself to the faith. As Representative Clarence Long observed, "countries will keep on doing what they want to do as long as the money keeps coming, and they will more or less ignore the rhetoric . . . our leverage is not going to work until we use it."[17]

The failure of the Carter administration to support human rights language bodes ill for the far more difficult challenge in foreign assistance. The economic development model prevailing in U.S. and which is supported by U.S. financial institutions often fosters repressive dictatorial regimes. Third World countries are increasingly dependent upon capital loans from public or private banks to finance development (and to cover the interest on past loans). The U.S. development model emphasizes a free, private enterprise market, combined with an export-oriented economy and a high rate of savings for domestic investment. In the poor countries, this often requires an upward redistribution of income, and severe discipline on the worker and peasant alike. In Chile, for example, Nobel prize-winner Milton Friedman advised the Chilean junta on a set of economic policies designed to bring development. The result was the progressive impoverishment of the middle and working classes, and the literal starvation of thousands.[18]

Clearly such policies could be enforced only under a brutal dictatorship, able to shut down the parliament, disband all political parties, outlaw the labor unions, suppress any sign of dissent or unrest. Torture in Chile is not the grim sport of sadists, but a necessary outgrowth of government policy.

If the administration is serious about supporting human rights, then it must begin to foster other models of development, and begin to rectify the long-term structural imbalance between the Third World and the developed nations. The Carter Administration has taken the first steps, by agreeing to a "common fund" to protect natural commodities from wild price fluctuations. Whether this policy change will move gradually towards a substantive redirection of American policy remains to be seen.

Personal Accountability

The early months of the Carter presidency have been devoted to a skillful manipulation of symbols designed to recapture public faith in the office. As the memo written by public relations expert Pat Caddell demonstrated, the campaign of gestures was planned to counteract the widespread loss of confidence, the lost sense of decency which was the better part of American expansionary idealism.

But neither President Ford's declaration nor President Carter's symbols suffice to put Watergate and Vietnam behind us. The haunting reappearance of Richard Nixon on TV served as a grim reminder of our recent past. Nixon's open assertion that the President acts above the law reminds us how executive officials through four administrations set out intentionally to act indecently abroad, and unlawfully at home. In the words of the special presidential committee meeting in 1954, "There are no rules . . . Hitherto acceptable norms of human conduct do not apply . . . Long standing American concepts of fair play must be reconsidered . . ."[19] For over twenty-five years, the hallmark of national security policy was lawlessness, as officials acknowledged no limits in the struggle abroad. Vietnam, Watergate, the crimes of the intelligence agencies—all are sad testimony to that assumption.

Now the country looks eagerly for a new direction. President Carter invokes our trust, while seeking to retain the "flexibility" to operate abroad. Like his predecessor, the President has chosen to put our past tragedies behind us by fiat, avoiding any national discussion of the lessons of Vietnam or Watergate. But neither symbols nor fiat will remove the widespread suspicion about the intentions of our leaders. Nor can unjustified trust and renewed license serve to protect us from a repetition of the follies of the past. The country and the administration might do better by seeking accountability, rather than faith.

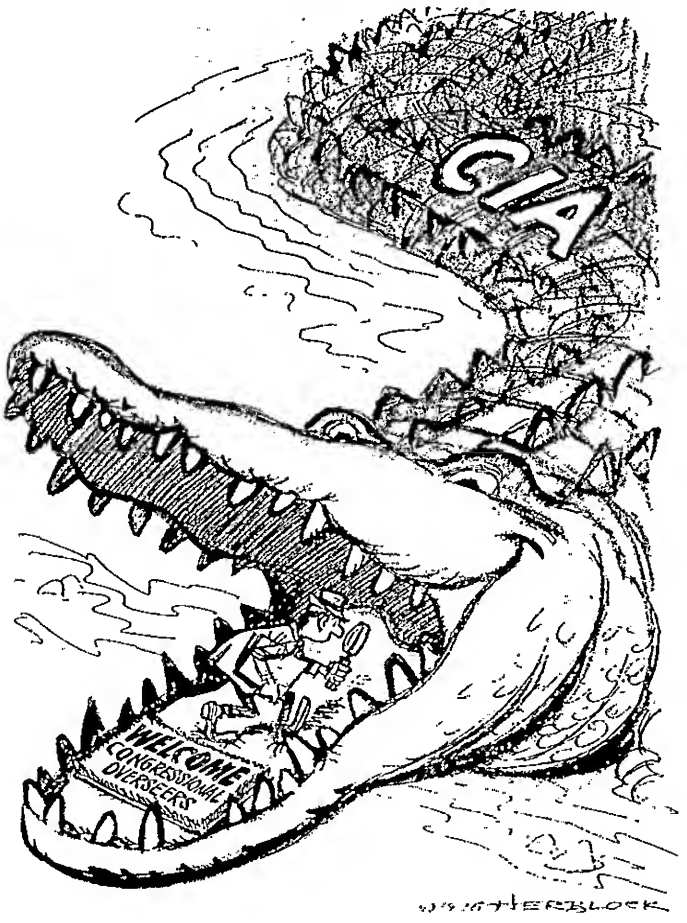
What is needed is the beginning of a long national dialogue about the limits to which government officials must adhere, what can and what cannot be done in pursuit of national objectives. At home, reform of the intelligence agencies should lead to a definition about what officials may or may not do to American citizens, and the highest officials should be made explicitly accountable to the proscriptions on lying, on wiretaps, on break-ins, on mail opening.

In foreign policy, a similar discussion must take place. One source of limitations should be the international treaties to which the United States adheres. International standards governing war and peace—particularly those defined in the Nuremberg tribunals, which this country applied to the leaders of Germany and Japan—should be reviewed, and enacted as

limits personally enforceable against executive officials.

Two years ago, twenty-five members of the House of Representatives joined in introducing a bill sponsored by Robert Kastenmeier entitled the Official Accountability Act. The legislation would incorporate the laws of war and peace to which the United States adheres into the domestic criminal code, making civilian officials personally responsible for their violation. In doing so, the legislation would force a review of the weapons and war plans currently developed which seem to violate the international laws of war. War crimes standards are not merely rhetorical concerns, but an immediate problem. The current budget requested by the Energy Research and Development Agency seeks funds to build an "enhanced radiation" nuclear warhead designed to kill people and preserve buildings. The "neutron killer" releases neutrons which attack the central nervous system, a blatant violation of the law concerning weaponry.

The development and enactment of limits applicable to our officials in the area of national security is a first order task of any coherent human rights policy. The primary threat to our security, and thus to our human rights, is the assumption that there are no limits in the area of national security, that anything is possible to the war planner or the war maker. The strongest protections for the rights of individuals are enforceable limits on the license of officials. Accountability—and not flexibility—is the byword of human rights. ■



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FOOTNOTES

[1]Interview with Zbigniew Brzezinski, *U.S. News and World Report,* May 30, 1977, p. 35.
[2]Presidential News Conference, March 24, 1977.
[3]*Op cit.*
[4]*New York Times,* May 11, 1977, p. 24.
[5]Statement of the House Subcommittee on Foreign Operations, Mar. 2, *1977, from Selected Statements, May 1, 1977, p. 18.*
[6]Tad Szulc, "Exporting Revolution," *The New Republic,* Sept. 21, 1974, p. 23.
[7]"The CIA Report," *Village Voice,* February 16, 1976.
[8]*New York Times,* Feb. 24, 1977, p. 22.
[9]*Face the Nation,* Feb. 27, 1977.
[10]See generally, Klare, Michael, "The Political Economy of Arms Sales," *Bulletin of the Atomic Scientists,* Nov. 1976.
[11]Klare, Michael, "Exporting the Tools of Repression," CNSS *National Security Reprint No. 104,* available at the Center for National Security Studies, 122 Maryland Ave., N.E., Washington, D.C. 20002. 50¢/copy.
[12]Statement on Conventional Arms Transfer Policy, May 19, 1977.
[13]Holt, Pat, "Weak U.S. Call Against Arms Sales," *Christian Science Monitor,* June 1, 1977.
[14]*Business Week,* April 25, 1977, p. 34.
[15]Barnet, Richard J., "U.S. Needs Modest, Uniform Stand on Human Rights, *Los Angeles Times,* Mar. 13, 1977.
[16]"Foreign Aid: Evading the Control of Congress," *Center for International Policy Report,* Jan. 1977.
[17]Quoted in Goodfellow and Morrell, "U.S. Aid and Comfort for World Torturers," *Los Angeles Times,* May 19, 1977.
[18]See generally, Letelier, Orlando, "Chile: Economic 'Freedom' and Political Repression," *Transnational Reprint No. 1,* available from IPS, 1901 Q Street, N.W., Washington, D.C. 20009
[19]*Final Report,* "Foreign and Military Intelligence," U.S. Senate Committee to Study Governmental Operations with Respect to Intelligence Activities, Vol. I, p. 50, April 26, 1976.
[20]See generally, Hearings, *Official Accountability Act,* House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Feb. 2, 1976.

The Administration's Wiretap Reform Bill—S. 1566

(Continued from p. 16)

case the surveillance moves from the foreign national to the American citizen suspected of being an agent. In most cases the Bureau's aim is to make the agent a double agent or to pass false information; arrest and conviction are not usually the objectives.

Both of these activities were presumed by the FBI and the Justice Department to be beyond the control of the courts and not subject to the same Fourth Amendment limitations as other kinds of surveillance might be. Wiretapping has always been, to use Justice Brandeis' famous phrase, "a dirty business," but in the eyes of the Supreme Court it has only been covered by by the Fourth Amendment since the Court issued the *Katz* decision in 1967. Thus when the Supreme Court in *Irvine v. California*, 347 U.S. 128 (1954) condemned the use of microphones planted in a suspect's bedroom, the then Attorney General sent the following memorandum to the FBI:

> It is clear that in some instances the use of microphone surveillance is the only possible way of uncovering the activities of espionage agents, possible saboteurs, and subversive persons. In such instances I am of the opinion that the national interest requires that microphone surveillance be utilized by the Federal Bureau of Investigation. This use need not be limited to the development of evidence for prosecution. The FBI has an intelligence function in connection with internal security matters equally as important as the duty of developing evidence for presentation to the courts and the national security requires that the FBI be able to use microphone surveillance for the proper discharge of both of such functions. The Department of Justice approves the use of microphone surveillance by the FBI under these circumstances and for these purposes.

And when the courts held that Section 605 of the Federal Communications Act applied to government officials and prohibited the use of wiretap evidence in a criminal trial, the government interpreted the ruling to mean that it could continue to conduct electronic surveillance provided that the information obtained was not disclosed to anyone outside the executive branch.

The courts and the Congress were generally and vaguely aware of these practices but on the whole were prepared to leave the matter to the Executive Branch. There was then no evidence of abuse, for this was the pre-Vietnam/Watergate era in which it seemed appropriate to defer on national security matters to the President. And there was no constitutional issue since wiretapping had not yet been held to come under the protection provided by the Fourth Amendment.

THE FLAWS IN S. 1566

In the late 1960s all of these conditions changed and controversy began to surround national security wiretapping. There is now a consensus on the need for legislation to control such surveillance and agreement now that all such surveillance should require a court order. To assess the adequacy of the current draft of S. 1566 it is necessary to carefully delineate what the abuses of the past have been and to determine if this legislation deals adequately with them.

Wiretaps and Illegal Evidence

The Supreme Court decision in *Katz* brought wiretaps under the Fourth Amendment for the first time and forced the Justice Department of Lyndon Johnson to take a closer look at FBI practices. The officials discovered that the FBI was routinely concealing the fact of wiretapping and other electronic surveillance from United States Attorneys and using the fruits of the surveillance to gather evidence for criminal convictions. The Justice Department began to admit to such wiretapping, particularly at the Supreme Court level, when the Solicitor General's office insisted on being informed of all wiretaps and on informing the Court of them.

The Court could no longer duck the issue of national security wiretaps and how they should be handled in a criminal case. In *Alderman v. U.S.*, 394 U.S. 165 (1968) the Supreme Court held that the trial court must be notified of any over-hearing of a criminal defendent on a wiretap. The court was then to determine if the surveillance was legal. If it were not, then the logs had to be turned over to the defendants for a taint hearing—to determine whether illegally obtained evidence was being used by the prosecution. The Court left open the questions of what kinds of surveillance violated the Constitution and what procedures the court should use to determine legality.

S. 1566 seems to be attempting a step backward from the procedure mandated by *Alderman* to prevent the fruits of an illegal surveillance from being used in a criminal prosecution. Under the provisions of the bill, if the court finds a surveillance illegal it must suppress the evidence obtained from the surveillance, but it is not obliged to turn the illegal logs over to the defendents so that they can attempt to prove that other evidence introduced at the trial was tainted by illegal surveillance. This provision of the bill lays out a procedure to be followed "not withstanding any other law," which is apparently an attempt to set aside the procedures which Congress passed to implement, and in part to limit, the *Alderman* decision. S. 1566 also attempts to provide guidance to the court in how to go about determining if the surveillance is legal. In doing so it emphasizes *ex parte in camera* proceedings rather than an adversary process.

Overhearing People Who Are Not the Subject of the Tap

A second abuse of the national security wiretap process arose from the use of information obtained from a surveillance placed on an embassy or other foreign establishment for the purpose of gathering foreign intelligence information. Embassy employees assume that their phones are tapped and generally proceed accordingly, but many American citizens, out of naivete or necessity, discuss business with foreign embassies over the telephone. Embassy taps thus produce significant information about the political views and activities of Congresspersons, journalists, and private citizens whose political or business activities brings them into contact with embassies.

The FBI has always, and continues to this day, to systematically exploit such information. In the late 1960s when President Lyndon Johnson asked the Bureau what it knew about the anti-war views and activities of members of Congress, FBI Director J. Edgar Hoover turned to his richest source—Embassy wiretaps—and began providing the White House with

regular reports on the anti-war activities of Senator William Fulbright and other leaders of the movement to force an American withdrawal from Vietnam.

Embassy wiretaps are also used to trace the contacts and activities of journalists. We know most about this practice from the file on Richard Dudman, the distinguished head of the Washington Bureau of the *St. Louis Post Dispatch*. Dudman has obtained much of his file as a result of a Freedom of Information Act request and subsequent lawsuit. The Bureau overheard Dudman numerous times on Embassy wiretaps. These logs were often placed in Dudman's file or indexed so that they could be retrieved by a search for information about him. They were used by the FBI to develop a portrait of Dudman's activities and to assess the possibility of recruiting him as an agent. There is no reason to think that this is an atypical case.

Incredible as it may seem S. 1566 not only does not prohibit such activity, but it actually, by omission and implication, sanctions it. The bill's procedures to minimize overhearing or recording conversations of people who are not the target of the tap apply only to information that does not relate *inter alia* to the ability of the United States to "provide for the national defense or security of the Nation" or "to provide for the conduct of the foreign affairs of the United States." With one exception there is no requirement to even try to minimize the acquisition or retention of information within those categories, even if it is obtained from United States citizens and relates to their views and activities.

The one exception is the prohibition on storing information relating "solely to the conduct of foreign affairs" so that it can be retrieved by reference to the name of an American. By implication, information (including people's opinions) related to national defense or national security can be stored so that it can be retrieved under the name of an American who was not the target of the surveillance and the bill provides no limitation on the use of such information.

The failure to deal with this problem cannot be explained by the fact that no one has focused on it. The American Civil Liberties Union has been urging the adoption of an amendment which would read as follows:

> Information obtained under the procedure of this chapter from a United States person who is not the *target of surveillance* shall *not be maintained* in such a manner as to permit its retrieval by the name of that person unless it is:
>
> (a) evidence of a crime
>
> (b) evidence that the person *is a foreign agent* eligible for surveillance
>
> (c) in a file maintained solely to respond to court orders related to electronic surveillance.

Unless something along these lines is added to the bill its enactment will sanction one of the worst and best documented abuses of national security wiretapping.

Selection of Targets

Another set of abuses arises from the question of who should be tapped on national security grounds. Originally such surveillance appears to have been limited to the tapping of embassies to gather foreign intelligence and to the surveillance of those believed actually to be spies in the service of the KGB. Gradually however the scope of the surveillance expanded to include men such as Martin Luther King Jr., who were asserted to be in contact with American communists and in danger of being controlled by them. Under the Nixon Administration there were two expansions of the categories of people on whom electronic surveillance might be conducted. One was secret and relatively small—the taps ostensibly intended to track down leaks, which were placed on newspapermen and government officials. The other was publicly proclaimed and massive.

The public program stemmed from the assertion by Attorney General Mitchell that he could authorize the surveillance of American citizens who were not believed to be in the service of a foreign power but whose activities were believed to pose a threat to "internal security." Under this program elements of the anti-war movement were surveilled, as were organizations including the Jewish Defense League and the Black Panther Party.

When members of these organizations were indicted, they demanded access to electronic surveillance logs thus requiring the courts to rule on the legality of various forms of electronic surveillance. With a few minor exceptions the courts have held that warrantless taps of embassies are constitutional, but that warrantless taps directed against American citizens who are not connected with a foreign power are unconstitutional. No court appears to have been confronted since 1968 with a surveillance targeted on an American citizen, who, it was claimed, was an agent of a foreign power.

The Supreme Court considered the matter only once in a case involving a group without any connections with a foreign power. In what has come to be known as the *Keith* case (after the District Court judge whose opinion was upheld) the Court ruled that the President did not have the power to conduct *warrantless* electronic surveillance of domestic groups. The Court, however, went on to indicate that Congress could authorize warrants for electronic surveillance for domestic intelligence purposes on a standard other than probable cause to believe that a crime was being committed. *U.S. v. U.S. District Court*, 407 U.S. 297 (1972).

Perhaps the most important thing about S. 1566 is that it does not pick up this invitation, and instead makes it clear that the executive and the judiciary should not together fashion a warrant standard for such domestic intelligence surveillance. With the enactment of this legislation, it will be clear that a person whom the government does not charge with being an agent of a foreign power may not be surveilled electronically except with a warrant based on probable cause to believe that a crime has been or is about to be committed and that evidence of the crime will be gathered.

Who Is an Agent of a Foreign Power?

The remaining and troublesome question has to do with the standard under which the government can bring a citizen or other person under the purview of the agent-of-a-foreign-power standard. Much of the debate on this question has focused on the important question of the so-called non-criminal standard, but there is a broader question of how clearly the legislation defines the circumstances in which an individual may be surveilled on suspicion of being an agent of a foreign power. Regrettably, the current bill takes several steps backward from S. 3197, the bill reported last year by the Senate Intelligence Committee.

The retrogression, which appears to be the deliberate work of the intelligence agency professionals (who reportedly were given a greater role in this effort), relate to (1) the category of "non-U.S. persons," (2) the vague criminal standard to which a vaguer conspiracy clause has now been added, and (3) the noncriminal standard paragraph which is a bit vaguer than

S. 3197 and to which for the first time has been added a conspiracy clause which renders its safeguards irrelevant.*

S. 1566 creates a new category of persons who may now be wiretapped. People who are lawfully in the United States but are neither citizens nor non-permanent resident aliens can be wiretapped if they are engaged in something called "clandestine intelligence activities" (which is nowhere defined—see the discussion below) in a manner which indicates that the activity would be harmful to American security. This open-ended authority is essentially the standard in S. 3197, as it was reported by the Senate Judiciary Committee and which the hearings of the Senate Intelligence Committee showed was ambiguous and full of loopholes. Visitors to our shores—whether simple tourists, lecturers, students or businessmen—would be subjected to surveillance under far less stringent conditions than citizens; both the wording of the Fourth Amendment, which applies to all "persons" and the spirit of our system, which has always been to accord all of the protections of the Constitution to all of those lawfully within our borders, would be ignored. No case has yet been made for the need for this major expansion of S. 3197.

The second set of problems relates to the paragraph which authorizes surveillance of a person who:

> Knowlingly engages in clandestine intelligence activities for or on behalf of a foreign power, which activities involve or will involve a violation of the criminal statutes of the United States.

That paragraph does not represent any change from S. 3197, but in the flurry of controversy over the non-criminal standard it has never gotten the careful scrutiny it deserves. "Clandestine intelligence activity" is not defined. Nor is there a list of the crimes which would give rise to the possibility of electronic surveillance. Removing those two defects would provide precision and fair notice of what conduct might subject one to such surveillance. Retaining them leaves broad loopholes.

The conspiracy provision which goes with this section has been re-written without the administration's having called the changes specifically to the attention of the Senate staffers working on the bill. It now provides that one need only conspire with or knowingly aid or abet any person engaged in such activity; unlike the earlier S. 3197 version, it does not require that the conspirator know the nature of the activity engaged in by the person being aided.

This conspiracy provision also now applies to the non-criminal standard paragraph. This is a major change and an enormous step away from narrowing the scope of the non-criminal provision. As it finally emerged from the Senate Intelligence Committee last year, the non-criminal standard section held no conspiracy provision at all. The individual to be surveilled had to be a knowing member of an intelligence network, transmitting information at its direction. The conspiracy clause throws the net over those who can be said to be assisting such an agent even if they do not know what the agent is up to. There are also a number of seemingly minor drafting changes in the paragraph which add up to a significantly looser standard.

* Those concerned with embassy taps have also seen that the bill is now written so that such taps can be authorized (1) by an Assistant Attorney General, (2) for a period of up to one year, (3) without requiring that the court be told exactly how the surveillance will be effected, whether by burglary or other means. These are major changes.

Senate aides have suggested that the intent was to return to the language of S. 3197 as ultimately revised, and that that will be done by the Judiciary Committee after its hearings in the middle of June.

Targeting People Not Suspected of Crime

Even so it would still leave the fundamental question of whether individuals who are not suspected of criminal activity should be the subject of electronic surveillance.

As Senator Kennedy noted in his statement announcing his intention of introducing the administration bill, the Justice Department has never made it clear why it needed a non-criminal standard.

Originally it was claimed that the provision was needed because the espionage law does not cover industrial information. However when it was pointed out that the Supreme Court in interpreting the phrase "national defense" in *Gorin v. U.S.*, 312 U.S. 19 (1941), had given it a very broad meaning which clearly included industrial information, this explanation was abandoned. The original draft from the Bell Justice Department expanded the definition to include harm to foreign affairs (which is not covered by the expionage law), but this expansion has now been abandoned in the bill as introduced. S. 1566 does expand the activity covered to include collection as well as transmittal of information. However, if the collection was with a view towards transmittal it would be covered by the conspiracy provisions. If collection really is the problem, then it could be cured by proposing a simple amendment to the espionage laws to make the collection of protected information by an agent of a foreign power a crime in peacetime as well as wartime. We could then debate that proposed change in the criminal law.

One suspects that the motives of the intelligence agencies, notably the FBI, for wanting a non-criminal standard for investigations is the same as the reason why those who have opposed the non-criminal standard are concerned: this legislation will cast a shadow over so-called counter-intelligence (*i.e.*, political) investigations of the FBI.

Operating under secret guidelines promulgated by Attorney General Levi, the FBI currently conducts counter-intelligence investigations of American citizens under a very loose and non-criminal standard which is reported to be very close to the standard in the original Levi version of S. 3197. That standard would permit surveillance of a large number of American citizens who are suspected—if only because they are dissidents—of relating in some way to a foreign power. By authorizing electronic surveillance under some circumstances without suspicion of crime, the legislation would be taken by the Bureau as constituting authority to conduct "lesser" forms of surveillance including the use of informants (which is not currently held to fall under Fourth Amendment Standards), under much looser standards. Such surveillance can then be used to establish whether a warrant for a wiretap can be obtained.

As Attorney General Harlan Fiske Stone warned long ago, and as the Church Committee reminded us recently, departing from a criminal standard opens Pandora's box. With the Church Committee and others documenting numerous cases of abuse stemming from a departure from the criminal standard it would be more than ironic if the first piece of legislation enacted by the Congress in response to the scandals were to ignore Stone's prophetic warning:

> The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with

their conduct and then only with such conduct as is forbidden by the laws of the United States. *When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty.* [Emphasis added.]

No bill which ignores that warning can be said to be effectively dealing with the abuses of the past. ■

The CIA and the U.S. Academic Community: Harvard's Report and Guidelines

Editor's Note: *One of the important problems which the Church Committee's Final Report detailed [see Book I,* Foreign and Military Intelligence, *Sen. Report. No. 94-755, April 26, 1976, pp. 179-191, 452-453, and 456] is that the CIA has been and continues to use the U.S. academic community for a variety of clandestine purposes. These include such things as using unwitting individuals, covertly recruiting American and foreign students as operatives, and providing cover and credibility to propaganda efforts.*

The Committee offered two recommendations [see page 456] to the government to counter the threat to academic freedom. First, it recommended that if the CIA uses individuals for "operational purposes," internal CIA regulations should be revised to require that both the individuals and the presidents of their institutions must "be informed of the clandestine CIA relationship." Second, the committee recommended that "as soon as possible . . . Congress examine whether further steps are needed to insure the integrity of American academic institutions."

The Committee Report also explained why it was reluctant to recommend specific laws to prohibit "the operational exploitation" of people in the academic community:

> *The Committee views such legislation as both unenforceable and in itself an intrusion on the privacy and integrity of the American academic community. The Committee believes that it is the responsibility of private institutions and particularly the American academic community to set the professional and ethical standards of its members. This report . . . is intended to alert these institutions that there is a problem. (p. 191)*

Harvard University's May 12, 1977 Guidelines for dealing with the problem are the first such response to the Church Committee's alert, and we reprint them here in full.

In addition, the report which accompanies the Guidelines contains, among other things, a discussion of the CIA's use of professors as covert recruiters. It is the most detailed public statement of the practice so far available, and we reprint it here.

Harvard's Guidelines for CIA on Campus

A. Harvard may enter into research contracts with the CIA provided that such contracts conform with Harvard's normal rules governing contracting with outside sponsors and that the existence of a contract is made public by University officials.

B. Individual members of the Harvard community may enter into direct or indirect consulting arrangements for the CIA to provide research and analytical services. The individual should report in writing the existence of such an arrangement to the Dean of his or her Faculty, who should then inform the President of the University.

C. Any member of the Harvard community who has an on-going relationship with the CIA as a recruiter should report that fact in writing to the Dean of the appropriate Faculty, who should inform the President of the University and the appropriate placement offices within the University. A recruiter should not give the CIA the name of another member of the Harvard community without the prior consent of that individual. Members of the Harvard community whose advice is sought on a one-time or occasional basis should consider carefully whether under the circumstances it is appropriate to give the CIA the name of another member of the Harvard community without the prior consent of the individual.

D. Members of the Harvard community should not

undertake intelligence operations for the CIA. They should not participate in propaganda activities if the activities involve lending their names and positions to gain public acceptance for materials they know to be misleading or untrue. Before undertaking any other propaganda activities, an individual should consider whether the task is consistent with his scholarly and professional obligations.

E. No member of the Harvard community should assist the CIA in obtaining the unwitting services of another member of the Harvard community. The CIA should not employ members of the Harvard community in an unwitting manner.

F. Questions concerning an interpretation and application of these guidelines should be discussed initially with the Dean of the appropriate Faculty and, if necessary, with the President of the University or a member of his staff.

Excerpted from the Harvard Report:

CIA Recruiting on Campus

We understand that, broadly speaking, the CIA uses two methods for systematic recruiting on university campuses. The first method involves sending an identifiable CIA recruiter to interview students and others who may be interested in becoming employees of the CIA. This method is open and visible and comparable to the recruiting efforts of other public and private organizations. We think it poses no issues of principle for the academic community.

The second method involves the use of individuals who may be professors, administrators or possibly students and who have an ongoing and confidential relationship with the CIA as recruiters. The job of these covert recruiters is to identify for the CIA members of the community, including foreign students, who may be likely candidates for an employment or other relationship with the CIA on a regular or sporadic basis. Although we are not certain how the recruiting process works, we understand that when the recruiter believes that a likely candidate has been identified, the name of the candidate is reported to the CIA, which then conducts a background check on the individual and creates a file with the information it obtains. Neither the recruiter nor the CIA informs the individual at this stage that he or she is being considered for employment or other purposes by the CIA. If the investigation confirms the view of the recruiter, the individual is then approached to discuss a present or future relationship with the CIA.

For a number of reasons we believe that members of the Harvard community should not serve as covert recruiters for the CIA. First and most importantly, it is inappropriate for a member of an academic community to be acting secretly on behalf of the government in his relationship with other members of the academic community. The existence on the Harvard campus of unidentified individuals who may be probing the views of others and obtaining information for the possible use of the CIA is inconsistent with the idea of a free and independent university. Such practices inhibit free discourse and are a distortion of the relationship that should exist among members of an academic community, and in particular of the relationship that should exist between faculty members and students.

There are other reasons for members of the Harvard community not to be involved in such a covert recruiting system if our understanding of it is correct. Foreign students pose a special problem. It is not unreasonable to suppose that recruitment of a foreign national by the CIA may lead to requests that the person engage in acts that violate the laws of his own country. We do not consider it appropriate for a member of the Harvard community — especially a faculty member who may have a teaching relationship with the foreign national — to be part of a process that may reasonably be supposed to lead to a request to an individual to violate the laws of another country. More generally, we question whether it is appropriate for a member of the Harvard community to trigger a secret background investigation of another member of the community. Such an investigation is an invasion of individual privacy, whether the subject of the investigation be a United States citizen or a foreign national. Moreover, the conduct of a secret investigation is likely to lead to additional secret governmental intrusion into the campus as the CIA tries to develop more information about the subject of the investigation. Finally, it is impossible to know to what uses the information may be put in future years and in what ways the life of the subject of the investigation may be adversely affected.

For these reasons we conclude that any member of the Harvard community who has an on-going relationship with the CIA as a recruiter, with or without compensation, should make his or her role known to the Dean of the appropriate Faculty who in turn should inform President of the University and the appropriate placement offices within the University. At the placement offices the names of recruiters would be available to all members of the Harvard community. Because of the CIA's authority to conduct secret background investigations, no recruiter at Harvard should suggest a name of a member of the Harvard community to the CIA as a potential employee or for other purposes without the consent of the individual.

We recognize that there are other possible CIA "recruiting" situations that do not involve an on-going relationship between the CIA and the individual whose advice is being sought. For example, when a new President of the United States is elected, a faculty member might be asked to recommend candidates for top staff positions in the CIA. Or a faculty member who has had a consulting relationship with the CIA may be asked to recommend a colleague to undertake some specialized research for the CIA. Occasional acts of recommendation such as these would ordinarily pose no special problems. Even here, however, an individual should exercise discretion to make certain that he or she is not causing difficulty or embarrassment for another member of the Harvard community. Depending on the circumstances, it may be appropriate to request consent from an individual before presenting his or her name to the CIA. Because of the special situation of foreign nationals, consent should be obtained before recommending a foreigner to the CIA. ■

Attorney General Requires Greater Openness Under the FOIA

Editor's Note: *On May 5, 1977, Attorney General Griffin Bell issued a letter which in effect amends the Freedom of Information Act in favor of broader disclosure. The key sentence in Bell's letter, reprinted below, is that ". . . the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act." Bell's decision is a response not only to the enormous FOIA caseload now in court, but also to the fact that the government has been losing a large percentage of cases.*

The Attorney General's new position has already improved agencies' attitudes about releasing documents. For example, in Phillippi v. CIA, *brought for records relating to the CIA's effort to suppress press coverage of the* Glomar Explorer, *the government has at last, after two years in court, admitted that the documents do exist and that it will release some of them.*

May 5, 1977

LETTER TO HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: *Freedom of Information Act*

I am writing in a matter of great mutual concern to seek your cooperation.

Freedom of Information Act litigation has increased in recent years to the point where there are over 600 cases now pending in federal courts. The actual cases represent only the "tip of the iceberg" and reflect a much larger volume of administrative disputes over access to documents. I am convinced that we should jointly seek to reduce these disputes through concerted action to impress upon all levels of government the requirements, and the spirit, of the Freedom of Information Act. The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. Let me assure you that we will certainly counsel and consult with your personnel in making the decision whether to defend. To perform our job adequately, however, we need full access to documents that you desire to withhold, as well as the earliest possible response to our information requests. In the past, we have often filed answers in court without having an adequate exchange with the agencies over the reasons and necessity for the withholding. I hope that this will not occur in the future.

In addition to setting these guidelines, I have requested Barbara Allen Babcock, Assistant Attorney General for the Civil Division, to conduct a review of all pending Freedom of Information Act litigation being handled by the Division. One result of that review may be to determine that litigation against your agency should no longer be continued and that information previously withheld should be released. In that event, I request that you ensure that your personnel work cooperatively with the Civil Division to bring the litigation to an end.

Please refer to 28 CFR 50.9 and accompanying March 9, 1976 memorandum from the Deputy Attorney General. These documents remain in effect, but the following new and additional elements are hereby prescribed:

In determining whether a suit against an agency under the Act challenging its denial of access to requested records merits defense, consideration shall be given to four criteria:

(a) Whether the agency's denial seems to have a substantial legal basis,

(b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,

(c) Whether there is a sufficient prospect of harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and

(d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.

The criteria set forth above shall be considered both by the Freedom of Information Committee and by the litigating divisions. The Committee shall, so far as practical, employ such criteria in its consultations with agencies prior to litigation and in its review of complaints thereafter. The litigating divisions shall promptly and independently consider these factors as to each suit filed.

Together I hope that we can enhance the spirit, appearance and reality of open government.

Yours sincerely,

/s/Griffin B. Bell
Attorney General

In The News

CIA/AUSTRALIA. Former Australian Prime Minister Gough Whitlam has called on the Parliament to open a government investigation of CIA activities in Australia, including the use of Australian agents as "proxies" in destabilizing Chile, interfering in Australian politics, and manipulating trade unions there. A few weeks after Whitlam's outcry, former CIA agent Philip Agee named four diplomats attached to the US embassy in Canberra as alleged CIA agents. (*Washington Post*, 5/5/77 p. A1; *Washington Post*, 5/20/77, p. A3)

CIA ON CAMPUS: NEW GUIDELINES. Harvard University has just released new guidelines regarding the relationship between academics and the CIA, under which its faculty members must adhere. Harvard's general counsel said that faculty members who violated the guidelines could be dismissed. (See page 10.) (*New York Times*, 5/21/77 p. 24)

CIA/MICRONESIA. According to a report released by the Sen. Intelligence Committee, in Oct. 1973 Kissinger not only approved intelligence collection operations against Micronesia, but also gave permission for the CIA "to assess the possibility of exerting covert influence on key elements of the Micronesian independence movement. . . ." The report said that the CIA general counsel had given the legal opinion that the bugging of Micronesian negotiators was lawful; this was disputed by the State Department's legal advisor in May, 1976. President Carter had tried to block the report for a week, but the Committee had voted unanimously to release it. (*New York Times*, 5/4/77, p. 15)

CIA/PRESS. Sig Mickelson reported while he was its president, CBS news cooperated with the CIA from 1954 until 1961, when its new president, Richard Salant, severed all links. This cooperation was carried out with the approval of CBS Chairman William S. Paley. (*New York Times*, 5/28/77, p. 9)

CIA/PROGRAM AT A HIGH SCHOOL. Ten CIA employees have been tutoring computer students at D.C.'s Ballou High School, creating a local controversy. While the CIA explains the tutoring is an effort to improve the Agency's image among minority groups, some parents and teachers have started a campaign to have them ousted, fearing that the CIA may try to secretly recruit students. (*Washington Post*, 5/26/77, p. 31.)

CIA/SPIED ON NEWSPAPER COLUMNIST. According to documents released under the Freedom of Information Act, the CIA used as many as 16 agents a day in 1972 to spy on columnist Jack Anderson and his staff in an effort to discover his sources. Anderson is using the information in a $22 million suit against Nixon and other government officials. (*Washington Post*, 5/14/77, p. A1)

ESPIONAGE/PENTAGON ABOLISHES SECRET SPY UNIT. The Pentagon is abolishing its super-secret intelligence unit called Task Force 157, which used overseas commercial and business "cover" for monitoring international ports, the movements of Soviet naval ships, and shipments of nuclear weapons. All operations of the Task Force are to cease or be transferred to the CIA by Sept. 30, 1977. (*Washington Post*, 5/18/77 p. A1)

DEFENSE INTELLIGENCE/"KEEP IT LEGAL." In a memo addressed to all military intelligence agencies, Sec'y of Def. Harold Brown ordered that all operations be conducted "strictly within the law," and that any abuses, improprieties, or illegalities be reported "without hesitation." The order, seen as somewhat stronger than similar statements issued by CIA director Stansfield Turner and Attorney General Griffin Bell, also affirms the broad power of the recently established Inspector General for Defense Intelligence to investigate all such activities. (*New York Times*, 5/9/77, p. 1)

FBI/COINTELPRO. In September 1970, top FBI officials approved the anonymous mailing of a reprint of a *New York Times* article which "highlighted the fears of Jews to the anti-Zionism of the 'New Left' and Black Panther Party" to various political activists, including Marcus Raskin of the Institute for Policy Studies. (*Washington Post*, 4/30/77, p. A7)

FBI/INVESTIGATION OF AGENTS. 20 civil libertarians and legal experts have written to Attorney General Bell "to express our strong support for your efforts to investigate and prosecute culpable individuals" in the FBI. (*Washington Post*, 5/5/77, p. A7)

FBI/MANUAL OF INSTRUCTION. In response to a Freedom of Information Act request from an inmate at a federal penitentiary, the FBI has released its Manual of Instruction. 970 pages were released; large parts of the sections describing investigative procedures were deleted: (*Washington Star*, 5/9/77, P. A14)

FBI/OFFICIAL KNOWLEDGE OF ILLEGAL ACTS. Robert Mardian, former head of the Justice Department's Internal Security Division denied that he knew of the FBI's illegal use of wiretaps and mail opening as was alleged by James Angleton, former chief of CIA counterintelligence. William C. Sullivan, former head of the FBI's Intelligence Division, said that it was "possible" that he gave FBI agents the go-ahead for "two or three" break-ins in the early 1970s. (*Washington Star*, 5/14/77, and 5/18/77, p. A6)

FOREIGN INTELLIGENCE AGENCIES IN U.S. Apparently due to the arrival of a new station chief in the South Korean embassy, there has been a crackdown on Korean dissidents in the Washington area by the KCIA. A Korean-language newspaper publisher and a Korean-language radio broadcaster have received warnings to end their criticism of the Park government; two other Koreans report being under surveillance, and one has learned of actions against his family in Korea because of his political activities in the U.S. (*New York Times*, 5/22/77, p. 16)

INTELLIGENCE COMMITTEE/REPORT. One of the recommendations coming out of the annual report of the Senate Intelligence Committee is to concentrate the authority over all U.S. intelligence agencies into a single office, to be called "Director of National Intelligence," which would (unlike the current "Director of Central Intelligence") have control over the activities and budgets of other agencies, including the National Security Agency. The report also stressed the need for legislative charters; the Committee is considering prohibitions against some covert operations such as assassinations, overthrowing democratically elected governments, and creating epidemics. (*New York Times*, 5/19/77, p. 15)

INTELLIGENCE OVERSIGHT/RESHUFFLE. President Carter announced the abolition of the For-

In The News *(continued)*

eign Intelligence Advisory Board, established in 1956 under President Eisenhower, which duplicated the oversight now carried out by the National Security Council and the Intelligence Comm. Carter also named three new appointees to the White House's Intelligence Oversight Board—Thomas Farmer, a former CIA agent; former Tenn. Sen. Albert Gore; and former Penn. governor and UN ambassador William W. Scranton. (*New York Times*, 5/6/77, p. 14)

LEGISLATION/CHARTERS. According to his press secretary, President Carter is "pleased with the professionalism and competence" of the intelligence agencies, but sees the need for legislation to define "what they may and may not do." (*Washington Star*, 5/14/77, p. A1)

LEGISLATION/LOCAL POLICE INFORMANTS. The Illinois House has passed a bill that would require police to get a warrant before informants could be used against individuals and lawful organizations. (*Chicago Tribune*, 5/20/77, p. 3)

LEGISLATION/WIRETAPS. The Carter administration's wiretap bill has been introduced in Congress by Rep. Peter Rodino and Sens. Birch Bayh and Edward Kennedy. (See the article on page 16.) (*Washington Star*, 5/18/77, p. A1)

WIRETAPS. According to the Administrative Office of U.S. Courts, there were 686 electronic intercepts authorized in 1976 by federal and state judges, the lowest number since 1970. Intercepts authorized at the request of the Justice Department increased from 108 in 1975 to 137 in 1976, the largest number since 1973. (*Washington Star*, 5/24/77)

In The Literature

BOOKS

Not Above The Law: The Battles of Watergate Prosecutors Cox and Jaworski, by James Doyle (Morrow: New York, 1977). The public affairs assistant to Cox and Jaworski describes the functioning of the Watergate Special Prosecution Force, including new disclosures concerning key Watergate figures.

The Right and the Power, by Leon Jaworski (Reader's Digest Press: New York, 1976). The Former Special Prosecutor explains the intricacies of the Watergate investigation.

GOVERNMENT PUBLICATIONS

Annual Report of the Select Committee on Intelligence, U.S. Senate, 95th Cong., 1st Sess. May 1977, 41 pp. The first annual report delineates ongoing investigations, hearings and a proposed National Intelligence Act.

Lawsuits Against The Government Relating To A Bill To Amend The Privacy Act Of 1974, May 6, 1977 Edition, prepared by the Comptroller General. Includes a list of 143 lawsuits "pending against the Government or its employees for activities, such as trespass without consent, listed in House bill 12039," and information on the statutory authority for hiring private attorneys to defend government officials.

ARTICLES

Spying Is Spying Is Spying Is Spying, Jerry J. Berman and Morton H. Halperin (*New York Times*, 5/26/77, p. 31). Discusses the "Catch-22" of the FBI's claim that they have reduced the number of intelligence investigations. In reality, the FBI is still investigating the same people and organizations—they've just changed the words around.

New Assault Begun Against Eavesdropping, by Richard Dudman, *St. Louis Post-Dispatch*, May 22, 1977, p. 3C. A discussion of the provisions of the administration's new wiretapping bill and the criticisms being leveled against it by the ACLU and others.

When G-Men Break the Law, by Peter Goldman with Nicholas Horrock, *Newsweek*, May 30, 1977, pp. 28-29. Describes the breadth of the FBI's illegal burglaries, wiretapping, and mail opening, and the problems in obtaining indictments of upper level officials.

Upgrading the Fight Against Terrorism, by Brian M. Jenkins, *The Washington Post*, March 27, 1977, pp. C1-C4. Alarmed by the apparent increase in terrorist activity worldwide, a Rand Corp. official is critical of the U.S. for having no single agency with jurisdiction for thwarting terrorism.

The Secret Army Drug Experiment: What Did Warren Burger Know? by Howard Kohn and Martin Porter, *Rolling Stone*, April 21, 1977, pp. 46-51. Harold Blauer was one of two men to die as a result of government sponsored drug tests on humans in the 1950s. Investigation has indicated that Supreme Court Chief Justice Burger, then head of the Justice Dept.'s civil division, was involved in covering-up the operation when a lawsuit was filed by Blauer's widow.

The Red Squad Files: The Truth About Police Spying in Chicago, by David Moberg, *The Chicago Reader*, Feb. 25, 1977, p. 9. An account of the activities of the Chicago Police red squad, with special focus on the kinds of information which was collected about left groups.

The FBI Once Honored Its 'Bag Jobs', by Anthony Marro, *New York Times*, 5/1/77, sec. 4 p. 1. Discussion of the differing rationales about whether FBI agents should be prosecuted for illegal activities.

Watching Over Intelligence Involves New Fears and Doubts, by Anthony Marro, *New York Times*, 5/22/77. Discusses the first annual report of the Senate Intelligence Committee, saying that it "seemed designed to show a maximum amount of activity while giving a minimum of details."

Carter and the CIA, by Arthur S. Miller, *The Progressive*, May 1977, pp. 9-10. Describes the Carter Administration's stand on increased secrecy in light of public disclosure of CIA payments to King Hussein and of constitutional issues.

Have You Ever Supported Equal Pay, Child Care, or Women's Groups? The FBI Was Watching You, by Letty Cottin Pogrebin, *Ms.*, June, 1977, pp. 37-44 and 69-76. An account of the FBI's surveillance between 1969 and 1973 of the Women's Liberation Movement (WLM), in spite of an absence of criminal activities.

Taps, Bugs, and Fooling the People, by Herman Schwartz (Field Foundation: New York, 1977). Available free from the Field Foundation, 100 East 85th St., NY, NY 10028.

Carter's Intelligence Chief Sizes Up World's Trouble Spots: Interview with Admiral Stansfield Turner, *U.S. News and World Report*, May 10, 1977, pp. 24-26. Among other topics, Turner reaffirms his belief that "We can't abandon covert action."

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How Griffin Bell Sees His Role As Attorney General: Interview with the head of the Department of Justice, *U.S. News and World Report*, May 16, 1977, pp. 67-70. Attorney General Bell discusses a charter for the FBI, further indictments of FBI agents, and wiretap legislation.

LAW REVIEWS

Administrative Law — FOIA — Agency Secrecy Continues, Greg Adams, 52 *Wash. L. Rev.* 121 (Nov. 1976).

Administrative Law — FOIA, Clifford Atkinson, 16 *Natural Resources J.* 1027 (Oct. 1976).

Departmental Executive Privilege: A Bar To Disclosure When Dealing With The IRS, Donald Hartman, 11 *Gonzaga L. Rev.* 931 (Spring 1976).

Retrospective Look at the Privacy and Freedom of Information Acts, K.A. Kovach, 27 *Lab. L. J.* 548 (Sept. 1976).

Title III and National Security Surveillances, Robert Poyourow, 56 *B.U. L. Rev.* 776 (July 1976).

Allende Regime in Chile: An Historical and Legal Analysis, E. Velasco, 9 *Loyola U. L. Rev.* (LA) 548 (Sept. 1976).

NOTE: Fourth Amendment and Judicial Review of Foreign Intelligence Wiretapping: Zweibon v. Mitchell, 45 *Geo. Wash. L. Rev.* 55 (Nov. 1976).

RECENT DECISIONS: Administrative Law — FOIA: The Processing of an Unexpected Deluge of FOIA Requests on a First-In, First-Out Basis, Except Where the Information Seeker Demonstrates Exceptional Need or Urgency, Is Compliance with the FOIA," 11 *Ga. L. Rev.* 241 (Fall 1976).

NOTE: Present and Proposed Standards for Foreign Intelligence Electronic Surveillance, 71 *Nw U. L. Rev.* 109 (March/April 1976).

New Documents

Available from the Center for National Security Studies Library

ELECTRONIC SURVEILLANCE/WARRANTS. 2/26/76, Memorandum from Ron Carr, Special Assistant to the Attorney General, to Mike Shaheen, Counsel on Professional Responsibility (2 pages). According to Carr, the Attorney General signed requests to a U.S. District Judge for approval of 2 wiretaps; the Judge issued the warrants although the circumstances did not fit the procedures of the Safe Streets Act.

ELECTRONIC SURVEILLANCE/IGNORING JUDICIAL RESTRICTIONS. 5/20/54, Memorandum from Attorney General. The AG authorizes the FBI to ignore the Supreme Court's decision in *Irvine v. California*, 347 U.S. 128 (1954), concerning microphone surveillance.

In The Courts

SURVEILLANCE. *Avery v. U.S.*, Civ. Action #77C-234 (E.D.N.Y.); *MacMillen v. U.S.*, Civ. Action #77C-597 (E.D.N.Y.); and *Birnbaum v. U.S.*, Civ. Action #76C-1837 (E.D.N.Y., May 12, 1977). In three consolidated CIA mail opening cases, a jury, following a charge by Judge Jack B. Weinstein, advised the court that each opened letter was worth between $2,500 and $10,000.

SURVEILLANCE. *Abramovitz v. Ahern*, Civ. #N77-207 (D.Conn.) (May 12, 1977). A group of 52 New Haven residents filed suit in federal district court alleging illegal wiretapping by the New Haven police, the Connecticut state police, and the FBI.

SURVEILLANCE. *Black Panther Party v. Bell*, Civ. Action #76-2205 (D.D.C., May 26, 1977). Judge John Lewis Smith denied various government motions to dismiss on technical grounds and ordered all discovery completed by September 25, 1977.

CASES REPORTED

Cleaver v. Kelley, No. 76-795 (D.D.C., Dec. 22, 1976) is now reported at F. Supp. 80 (D.D.C. 1976). 1976).

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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON, MAY 13, 1798

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The Administration's Wiretap Reform Bill—S. 1566

Point of View

BY MORTON H. HALPERIN

Senator Edward Kennedy has recently introduced a revised national security wiretap bill, S. 1566, which has the support of the Carter Administration and a bi-partisan group of Congresspersons across a broad political spectrum. It is now very likely that, at long last, a bill will be passed to regulate electronic surveillance on national security grounds and to require a judicial warrant for all such surveillance, at least in the United States.

This seems, therefore, to be an appropriate time to step back and ask what the Foreign Intelligence Surveillance Act of 1977 (S. 1566) is all about. How well does it deal with the acknowledged abuses which have generated support for this legislation?

To understand the purport of the proposed legislation one must examine practice and judicial opinions both before and after the Supreme Court decision in 1967 putting wiretaps under the Fourth Amendment. *Katz v. U.S.*, 389 U.S. 347.

WIRETAPPING—PAST PRACTICE AND LEGAL HISTORY

Electronic eavesdropping as a tool of espionage and counter-espionage has apparently been a part of the FBI investigative repertoire as long as the technology existed. Two different activities are at issue and the distinction is important to understanding the current draft of S. 1566.

One purpose of this national security surveillance is to gather information about the activities of foreign governments. There is no suggestion that illegal activity is underway; the State Department and the CIA simply want to know what is being said at the Russian and other key embassies. The ideal prototype is the lazy Russian Ambassador who routinely has emergency cables read to him at his mistress's residence because he does not want to come in to the Embassy in the middle of the night unless it is really urgent. Mostly, the fare is apparently much more meager; gossip and information about what people are doing which could, and perhaps sometimes even does, turn out to be of some use to the intelligence analysts.

The second type of "national security" surveillance which the FBI has traditionally conducted relates to the Bureau's counter-intelligence mission of keeping track of the agents of the KGB and other hostile intelligence services. In a typical

(continued on page 7)